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Supreme Court of the United States.

WILLIAM C. FITTS, AS ATTORNEY-GENERAL OF THE STATE OF ALABAMA, ET AL.,
APPELLANTS,

vs.

CHARLES M. McGHEE AND HENRY FINK, AS RECEIVERS OF M. & C. R. R. CO., ET AL.,
APPELLEES.

BRIEF AND ARGUMENT FOR APPELLEES.

MILTON HUMES,
PAUL SPEAKE,
SOLICITORS FOR APPELLEES.

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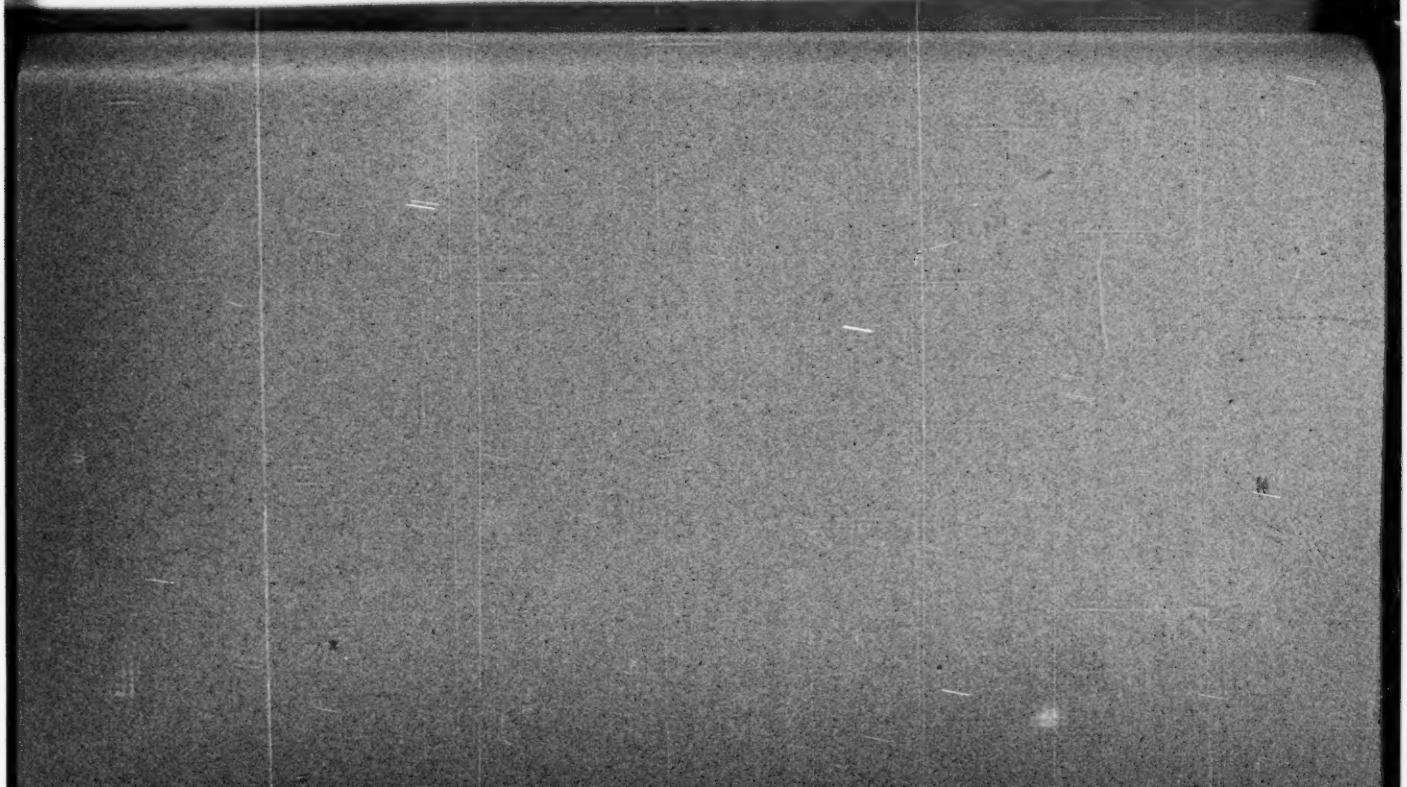

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STATEMENT OF CASE.

The bill as originally filed by Appellees was against the State of Alabama and its governor and attorney-general (Printed Record, p. 3). It was afterwards amended by making parties defendant, one W. H. Gilliam, and, still later, A. H. Carmichael, as solicitor or prosecuting attorney for the Eleventh Circuit of Alabama, (Pr. Rec., pp. 28, 33, 36). It was later dismissed as to the State and discontinued as to the governor of the State. (Pr. Rec., pp. 40, 180).

The purpose of the bill and its several amendments was to prevent the enforcement by the defendants of a certain Act of the General Assembly of Alabama, as follows:

"An Act to fix the maximum of tolls to be charged by the owners, lessees, or operators of the road bridge crossing the Tennessee River between the Counties of Colbert and Lauderdale, and known as the Florence Bridge, and to fix the penalty for demanding or receiving a higher rate of toll.

"Section 1. Be it enacted by the General Assembly of Alabama, That the maximum rates of toll to be charged by the owners, lessees, or operators of the bridge crossing the Tennessee River, between the counties of Colbert and Lauderdale, and known as the Florence Bridge, shall be as follows:—For each foot passenger $.05; for children under 14 years of age

and all pupils attending school $.02; for each one-horse vehicle and driver $.15; for each two-horse vehicle and driver $.25; for each three-horse vehicle and driver $.30; for each four-horse vehicle and driver $.35; for each additional horse to vehicle $.05; for each additional person in vehicle $.05; for each horse, mule, or animal of like kind with rider $.08; for each horse, mule, or animal of like kind $.05; for each cow, steer, or animal of like kind $.05; for each sheep, hog, goat or animal of like kind $.03.

"Section 2. Be it further enacted, That should the owners, lessees or operaters of said toll-bridge, by themselves or any of their agents demand or receive from any person a higher rate of toll than is prescribed by this act, he or they forfeit to such person twenty dollars for each offense, to be recoverable before any justice of the peace or notary public and *ex officio* justice of the peace of either of the said counties of Colbert or Lauderdale. Approved February 9th, 1895."

It was shown by the bill and amendments that said Gilliam was threatening to institute a suit under the forfeiture clause of said Act; that said Carmichael as solicitor or prosecuting attorney, charged by law with the duty of prosecuting offenders against the criminal laws of the State, was prosecuting in the criminal courts of the State certain cases instituted by indictment against appellees' employees, under a law of the State making it a misdemeanor for an employee of any bridge company or toll company to take, demand or receive any greater charge or toll than was authorized by such company's charter, or to take or demand an unreasonable charge or toll (Pr. Rec. p. 34); that said attorney general and governor were threatening a proceeding to have the charter and franchise of appellees declared forfeited for their failure to charge the tolls prescribed by said Act above copied.

The bill prayed a perpetual injunction against said several defendants and "all persons whomsoever" restraining the enforcement of said Act and the several proceedings threatened or begun in the State Courts and based upon said Act.

The bill and evidence show that appellees are receivers of the Memphis & Charleston Railroad Company, duly appointed by the Court in which the bill was filed, and authorized by the

decree appointing them to take charge and control of the property and assets of the Railroad Company and operate and manage the same under the orders of the Court, and before the institution of this suit they obtained an order from the Court authorizing its institution and prosecution to a final termination. (Pr. Rec., pp. 1, 2). The Railroad Company was chartered under the laws of the State of Tennessee by Act passed February 2, 1846, which is Exhibit BBB to the bill (Pr. Rec., pp. 11–20), and by section 23 of this Tennessee charter said company was authorized to "purchase, have and hold, any bridge or turnpike road over which it may be necessary to carry said railroad, and when the said purchase is made, to hold said bridge or turnpike road on the same terms, and with all the rights which belong to the individual, individuals, or corporation from which said purchase may be made."

By an Act of the Alabama Legislature, approved January 7, 1850, said Railroad Company was incorporated in Alabama, and by this Alabama charter it is provided (Pr. Rec., p. 21,) that "Said company shall have and enjoy all the rights, powers and privileges granted to it by the acts of incorporation" in Tennessee. By section 2 of this same Act said company was required to construct a branch road to Florence.

Sometime during the year 1850 the Railroad Company purchased or acquired a toll-bridge from the Florence Bridge Company, an Alabama corporation chartered in 1832 for the purpose of building, owning and operating such a bridge across the Tennessee River at Florence. (Pr. Rec., p. 10). The bridge thus bought was blown down between 1850 and 1860 (Pr. Rec., pp. 96, 106, 108,) and the bridge as it now stands was soon afterwards erected by the Railroad Company at the place where the old one had been. At the time the Florence Bridge Company was incorporated a ferry was in operation at Florence across the Tennessee River, and had been for some time previous, and by section 7 of said Bridge Company's charter it was enacted "That the rates of toll for crossing on said bridge shall never exceed the present rates of ferriage at said ferry." (Pr. Rec., p. 11).

Only two witnesses testify as to the exact rates in force at the ferry when the Florence Bridge was incorporated in 1832,

(Pr. Rec., pp. 96, 106, 107,) and according to both of these the rates then were higher than the Railroad Company was charging when the act of 1895 was passed. Numerous other witnesses, however, while not remembering the exact rates of ferriage for the different subjects, all agree and the evidence is uncontradicted that the rates charged at the ferry were larger, or, at least, no less than those since charged by the Bridge Company and the Railroad Company. (Pr. Rec., pp. 79, 91, 92, 102, 103, 108, 112).

The following table shows, in column 1, the rates charged by the Railroad Company prior to and at the time of the passage of the Act of February 9, 1895, and, in column 2, the rates prescribed by the act. (Pr. Rec., pp. 4, 6, 89, 90, 94, 97, and 110):—

	I.	II.
Persons on foot, each	$ .10	.05
1-horse vehicle and driver	.30	.15
2-horse vehicle and driver	.50	.25
4-horse vehicle and driver	.75	.35
6-horse vehicle and driver	1.00	.45
Horse and rider	.20	.08
Horse, mule, etc., each	.10	.05
Cattle, each	.10	.05
School children, each	.04	.02

The Florence Bridge, formerly a toll-bridge alone, is now a toll-bridge and railroad bridge combined—the railroad portion being immediately above the toll portion, both supported by the same piers and abutments, or foundation. It is about half a mile in length and has a draw 412 feet long, second to the largest in the United States, operated by a steam engine. It has stone abutments and piers and in superstructure is a first-class steel bridge of the most approved style. (Rec., p. 85).

The Railroad Company paid the Bridge Company $40,000 or $50,000, in stock of the Railroad Company, which, according to the witness, S. D. Weakley, was a very fair exchange, (Pr. Rec., pp. 106, 122). At the time of this sale the piers that the old bridge had stood on were all that remained of the old bridge (Rec., p. 110). The citizens of Florence were the stockholders and owners of the Bridge Company, and agreed with

the Railroad Company to build the five miles of branch road to Tuscumbia and the bridge over the Tennessee River, and when completed to turn the branch road and bridge over to the Railroad Company, and the stockholders of the Bridge Company were to receive stock in lieu of the bridge and the rights and franchises of the Bridge Company, (Pr. Rec., pp. 110–111).

R. B. Pegram, a witness for appellees, testifies that the total valuation of the bridge is about $250,000, and does not think it could be built for that. The total earnings from the toll portion of the bridge for the twelve months ending December 31, 1894, were $3,281.92, and the actual expenses of operating it were $1,817.50, leaving $1,464.42 to pay taxes, insurance and incidentals. "We nearly always have lawsuits on hand. When this suit was brought there were two lawsuits in the Alabama courts, growing out of injuries received on the bridge.

"Assuming that the valuation of the toll-bridge is one-half of the total cost of the bridge, this assumption being based upon the theory or idea that the toll-bridge was built first and the superstructure was only strengthened to carry the railroad trains on the railroad portion of the bridge, the net earnings of the toll-bridge would be less than one per cent. interest on the amount actually invested in the structure, making no allowance for contingent liabilities.

"The act of the legislature which is complained of in this case, a copy of which is made a part of the original bill of complaint, passed at the last session of the General Assembly of Alabama, fixes the rate of toll over this bridge at exactly one-half of the rate of toll which is now charged and which was charged at the time of the passage of the act, by the railroad company. Owing to the limited population on both sides of the river, in my opinion the increased use of the bridge on account of the decreased toll would not be appreciable, and that the effect of the act would be that for operating this part of the bridge the gross earnings would be greatly less than the expense of operating. Assuming that the rate of increase in business would be 20 per cent., the reduction provided by the act would be such that the gross earnings would just about equalize the expense, and the owners of the bridge would be

furnishing free service to the public for the use of it." (Pr. Rec., p. 86).

It is further shown that the receipts from the toll-bridge have been declining all the time for the past five or six years. (Pr. Rec., pp. 87, 91).

A. H. Plant, the Auditor for appellees, shows by his testimony and the statements attached thereto as exhibits, that the appellees have been operating the bridge at an actual loss, taking into consideration its fixed charges and the cost of maintaining and operating it. He states that from the present and past volume of the business of this road in operating this bridge, if the rates of toll established by the act of 1895 were put into effect, there would be considerable loss from operation; the reduction in rates would be 50 per cent., and the travel would not be increased to anything like that amount by the reduction. "From my knowledge of the situation at Florence and the surrounding country I do not think there would be enough business to justify an increase of 50 per cent. in the travel over the Florence Bridge. Taking into consideration the present actual volume of business in the operation of this bridge, the earnings from this foot-way under the rates prescribed by the act of 1895, would not be sufficient to pay for the service and keeping up the bridge * * * * * My opinion as to the real value of the wagon-way part of the bridge would be about $176,000, that is to say, if the bridge were to be rebuilt for a wagon and foot bridge it would cost about $176,000, to replace the same kind of a bridge there for the use of foot passengers, exclusive of the railroad. * * * * *

"The bonded debt on the entire line of the Railroad Company is $5,524,000, or about $20,000 per mile." It is shown by the tabulated statements, which are made exhibits to Plant's deposition, that the net earnings from the toll portion of the bridge at the rate of tolls in force when the act of 1895 was passed, were as follows:—

$814.55 for the year 1893–4,
$1,238.62 for the year 1894–5,
$2,146.31 for the year 1895–6;

and that the rates of interest on the amount of capital invested in this portion of the bridge represented by these net earnings were, respectively, 1.6 per cent., 2.4 per cent., and 4·2 per cent.

This statement also shows that, at the rates prescribed by the act of 1895 the capital invested would not only have not yielded interest, but that there would have been an actual loss of $742, $490, and $60 during the respective years mentioned. (Pr. Rec., p. 160.)

According to the estimate of this witness the value of the fifteen piers remaining of the old bridge, which were used in the construction of the present bridge, was $60,000 (Pr. Rec., p. 151), and this added to the cost of substructure in making the new bridge $33,000, makes the total cost of substructure $93,000. The cost of superstructure for both toll-bridge and railroad-bridge was $166,484.33, (Pr. Rec., p. 163). The witness says: "To construct a safe foot and wagon-way bridge of same material as the present combination bridge, the substructure would have to be equally as strong and as costly as the present work. As an evidence of this fact some of the old piers now used were constructed for the original wagon bridge. It is estimated that only 33 per cent. should be deducted from the superstructure of the present combination bridge to arrive at the true value of the foot and wagon part. However, as a conservative estimate we deduct 50 per cent. of cost of superstructure and have the following valuation:

Substructure	$ 93,000.00	
Superstructure (50 per cent. of $166,484.33)	83,242.16	
Total value of footway	$176,242.16	
Interest on same at 7 per cent. per annum		$12,336.95
Average annual gross earnings foot bridge for past three years at present toll rate		3,662.25
At proposed rate		1,831.12

The evidence in the case further shows that the population of the town of Florence, on the north side of the river, is 6,000 or 7,000, and of Sheffield, on the south side, about 2,500. (Pr. Rec., pp. 116, 117, 128).

The foregoing is a fair statement of the material testimony in the case.

ARGUMENT.

The assignments of error, forty-three in number, really raise but six questions, which will be argued in the order stated, namely:

I. Is the suit brought in the proper forum, or is it within the jurisdiction of the Federal Court?

II. Is a bill of this character the proper method of testing the constitutionality of the Act of 1895?

III. Is it a suit against the State within the prohibition of the eleventh amendment to the Federal Constitution?

IV. Are the appellees the owners of the rights, privileges and franchises of the old Florence Bridge Company by valid purchase or otherwise, and so entitled to maintain the bill?

V. Does the Act of the Alabama Legislature, approved February 9th, 1895, impair the obligation of the contract contained in the charter of the Florence Bridge Company providing that the rates of toll for crossing on said bridge shall never exceed the present rate of ferriage at said ferry?

VI. Does the Act of February 9th, 1895, violate the Federal Constitution by depriving appellees of their property without due process of law, or are the rates prescribed by the act so unreasonable as to have that effect?

I.

The suit is clearly brought in the proper forum, regardless of the amount involved, or the citizenship of the parties.

The appellees are Receivers appointed by the Federal Court for the District in which the bill was filed. The Receivers are officers of the Court, and the property in their hands is in the hands of the Court. They have a right, regardless of the amount involved and regardless of citizenship, to seek instructions and protection from the Court, either by original bill or by petition.

The case of *In Re* Tyler, 149 U. S., 164, is directly in point.

The Court say in that case: "The property in question was in the custody of the Circuit Court, in a cause within its jurisdiction and protected by injunction. The power exercised was the power to protect the property in the custody of the Court from invasion, and in order to sustain the Receiver's application the ordinary grounds of equity interposition were not required to be set forth. Whether inadequacy of remedy at law in respect of the disputed taxes or the requisite jurisdictional amount, or diverse citizenship was shown to exist, was not, and could not be, matter of inquiry. * * * * No rule is better settled than that when a Court has appointed a receiver his possession is the possession of the Court, for the benefit of the parties to the suit and all concerned, and cannot be disturbed without the leave of the Court. * * * * *"

In Re Tyler, 149 U. S., 164, 181.
In Re Swan, 150 U. S., 637.
White vs. Ewing, 159 U. S., 36, 39.
Ex Parte Chamberlain, 55 Fed. Rep., 706.
Ledoix vs. LaBee, 83 Fed. Rep., 761.
Clark vs. McGhee & Fink, 87 Fed. Rep., 791.

II.

A bill of this character is the method best calculated to test the constitutionality of the act and to thus settle litigation and prevent a multiplicity of suits.

It is true, possibly, that the appellees might defend the one hundred crimipal prosecutions instituted in the State courts against their employees, and the numerous suits threatened against them under the forfeiture clause of the act, and the threatened proceeding by the State attorney-general to have their charter vacated, by raising the question of the constitutionality of the act.

But under the decision of this Court they are not required to defend these numerous cases, all involving the same question. A simpler method is provided, and has been approved by this Court.

In the case of Chicago, Milwaukee & St. Paul Railroad Co. vs. Minnesota, 134 U. S., 418, this Court say: "Neither the legislature nor such commission acting under the authority of the legislature can establish arbitrarily and without regard to justice and right a tariff of rates for such transportation, which is so unreasonable as to practically destroy the value of property of persons engaged in the carrying business on the one hand, nor so exorbitant and extravagant as to be in utter disregard of the rights of the public for the use of such transportation on the other.

"In either of these classes of cases there is an ultimate remedy by the parties aggrieved, in the courts, for relief against such oppressive legislation, and especially in the courts of the United States, where the tariff of rates established either by the legislature or by the commission is such as to deprive a party of his property without due process of law. * * * * *

"That the proper, if not the only, mode of judicial relief against the tariff of rates established by the legislature or by its commission is by a bill in chancery asserting its unreasonable character and its conflict with the Constitution of the United States, and asking a decree of court forbidding the corporation from exacting such fare as excessive, or establishing its right to collect the rates as being within the limits of a just compensation for the service rendered.

"That until this is done it is not competent for each individual having dealings with the carrying corporation, or for the corporation with regard to each individual who demands its service, to raise a contest in the courts over the questions which ought to be settled in this general and conclusive method. * * * * *

134 U. S., pp. 459–60.

"This Court has declared in several cases that there is a remedy in the courts for relief against legislation establishing a tariff of rates, which is so unreasonable as to practically destroy the value of the property of companies engaged in the carrying business, and that especially may the courts of the United

States treat such a question as a judicial one, and hold such acts of legislation to be in conflict with the Constitution of the United States, as depriving the companies of their property without due process of law, and as depriving them of the equal protection of the law."

St. L. & S. F. Ry. Co. vs. Gill, 156 U. S., 649, 657.

III.

The suit is not one against the State within the meaning of the Eleventh Amendment to the Federal Constitution.

"Where a suit is brought against defendants who, claming to act as officers of the State, and under the color of an unconstitutional statute commit acts of wrong and injury to the rights and property of the plaintiff acquired under a contract with the State, such suit, whether brought to recover money or property in the hands of such defendants, or for compensation in damages, or, in a proper case where the remedy at law is inadequate, for an injunction to prevent such wrong and injury, or for a mandamus, in a like case, to enforce upon the defendant the performance of a plain, legal duty, purely ministerial—is not, within the meaning of the Eleventh Amendment, an action against the State."

Pennoyer vs. Connaughy, 140 U. S., 1.
Reagan vs. F. L. & T. Co., 154 U. S., 389.
Osborn vs. Bank of the U. S., 9 Wheat, 738.
Davis vs. Gray, 16 Wal., 203.
Tomlinson vs. Branch. 15 Wal., 460.
Litchfield vs. Webster County, 101 U. S., 773.
Allen vs. Baltimore & Ohio Railroad, 114 U. S., 311.
Board of Liquidation vs. McComb, 92 U. S., 531.
Poindexter vs. Greenhow, 114 U. S., 270.
In Re Tyler, 149 U. S., 164.
Smythe vs. Ames, 169 U. S., 466.
Scott vs. Donald, 165 U. S., 58.

It is true in the case at bar the State of Alabama was nominally a defendant when the suit was brought, but, as said by the Court in the Reagan case above cited, "going back of all

matters of form, the only parties pecuniarily affected are the shippers and the carriers, and the only direct pecuniary interest which the State can have arises when it abandons its governmental character and, as an individual, employs the railroad company to carry its property. There is a sense, doubtless, in which it may be said that the State is interested in the question, but only in a governmental sense. It is interested in the well-being of its citizens, in the just and equal enforcement of all its laws; but such governmental interest is not the pecuniary interest which causes it to bear the burden of an adverse judgment. Not a dollar will be taken from the treasury of the State, no pecuniary obligation of it will be enforced, none of its property affected by any decree which may be rendered. It is not nearly so much affected by the decree in this case as it would be by an injunction against officers staying the collection of taxes, and yet a frequent and unquestioned exercise of jurisdiction of courts, State and Federal, is in restraining the collection of taxes, illegal in whole or in part."

Reagan vs. F. L. & T. Co., 154 U. S., 390.
See also 35 Fed. Rep., 870.

This case is similar in some of its features and in the law governing its disposition, to the case of the State of Louisiana vs. Lagarde, 60 Fed. Rep., 186. In that case, proceedings were taken by the State, represented by its attorney-general and commisioner of agriculture, under an act of the State of Louisiana, requiring all manufacturers of and dealers in commercial fertilizers within the State to obtain license, etc., and providing penalties for failure to conform to its provisions. The defendants filed a cross-bill against the State and its said officers to enjoin the prosecution of these proceedings. Judge Pardee held that the complainants in the cross-bill were entitled to relief, because they were engaged in interstate commerce and not amenable to the provisions of said act. In his opinion he lays stress upon the fact that "the bureau of agriculture and their agents are threatening and intending to harass and annoy the complainants with civil and criminal prosecutions under said act until they shall pay the revenue demanded, or be compelled to abandon their business," and recognizes that an

injunction against the board of agriculture in this one suit will prevent this multiplicity of suits by various parties. Judge Pardee further says: "The case, then, is one within the jurisdiction of this Court, and warrants relief according to equity principles and practice. An injunction is the usual relief in such cases, and it is asked for in this case. The respondents say that it cannot be issued, because the suit is one against the State, and the State cannot be enjoined, nor can it be issued against the law officers of the State, to restrain them from instituting criminal proceedings under the said law, nor can it issue against State officers or State boards, because such an injunction would be equivalent to an injunction against the State. The State of Louisiana was a party to the suit under which complainant's bill, as a cross-bill, was originally filed; and when, by consent of parties and an order of court the cross-bill was permitted to stand as an original bill, the State of Louisiana was not dismissed, but remained as, practically, a nominal party.

The objection that the suit is one against the State so far as it has merit, can be eliminated from the case by the formal dismissal of the bill as to the State of Louisiana. The board or bureau of agriculture or any of the individual members thereof, and some other persons who cannot be classed as agents, attorneys, or employees of said board against whom complainants desire relief, should be made parties. Leave will be given to the complainants to amend their bill in these respects."

60 Fed. Rep., 192.

It follows that if this was originally a suit against the State within the constitutional prohibition, the objection was obviated when the bill was amended by striking out the name of the State as a defendent.

The case having been dismissed for want of jurisdiction as to the State, the governor and attorney general are still parties.

"In deciding who are parties to the suit, the Court will not look beyond the record. Making a State officer a party does not make the State a party, although its law may have prompted his action, and it may be the real party in interest."

Davis vs. Gray, 16 Wall., 203.

"An injunction will lie against officers of the State to prevent the execution of laws which violate rights under the Constitution of the United States."

Osborn vs. Bank of U. S., 9 Wheat., 738.
Davis vs. Gray, 16 Wall., 203.
Central Trust Co. vs. Citizens St. Ry. Co., 82 Fed. Rep., 1.
Indianapolis Gas Co. vs. City, 82 Fed. Rep., 245.
Mutual Life Ins. Co, vs. Boyle. 82 Fed. Rep., 705.

"An injunction may be granted against officers of a State to restrain the collection of taxes in violation of a contract with the State."

Allen vs. B. & O. R. R. Co., 114 U. S., 311.
Litchfield vs. Webster Co., 101 U. S., 773.
Tomlinson vs. Branch, 15 Wal., 460.

IV.

The appellees are the owners of the rights, privileges and franchises of the Florence Bridge Company, and as such are entitled to the aid of the Court.

Appellants contend that as the charter of the Florence Bridge Company does not, in terms, confer upon that corporation the power to sell or otherwise dispose of its corporate franchises, the appellees are not entitled to maintain this suit; that the sale to it by the Florence Bridge Company is *ultra vires* and void.

The Tennessee charter of the Memphis & Charleston Railroad Company expressly authorizes it to "purchase, have and hold *any bridge* over which it may be necessary to carry said road, and when said purchase is made, to hold said bridge on the same terms and *with all the rights* which belong to the individuals or *corporation* from which said purchase may be made."

This provision of the Tennessee charter enures to the benefit of the Railroad Company as incorporated in Alabama, by

reason of that provision of the Alabama charter which declares: "Said company shall have and enjoy all the rights, powers and privileges granted to them by the acts of incorporation above mentioned," (that is, of Tennessee,) "and shall be subject to all the liabilities and restrictions imposed by the same." The Supreme Court of Alabama, construing this section of the Alabama charter, has said: "The purpose was to confer powers, rights and privileges co-extensive with those granted by the Tennessee act of incorporation, and the language employed is comprehensive enough to include, by necessary construction, each and every right, power and privilege granted thereby."

Johnson vs. The State, 88 Ala, 176, 180.

We submit that this provision, not only gives the Railroad Company the power to *buy*, but gives to the Bridge Company the power *to sell.*

There can be no purchase without a sale, no purchaser without a seller.

The Railroad Company is to buy "any bridge", and acquire thereby the rights of "any corporation" therein. The State legislature must be presumed to have known what corporations it had created, and that among them was the Florence Bridge Company. By the Alabama charter, moreover, the Railroad Company was *required* to build a branch road to Florence, in case the road should be built to Tuscumbia. The legislature knew that in order to build the road to Florence from Tuscumbia the river would have to be crossed, and that for this purpose a bridge would be necessayy. It must therefore be held to have had in view the possible purchase of this identical bridge by the Railroad Company and its consequent sale by the Bridge Company.

"The charter of a railroad company authorized it to purchase the franchise and property of another railroad company. HELD, to be an implied authority to the latter company to sell, though there was no provision in its charter giving that power."

N. Y. & N. E. R. R. Co., vs. N. Y., N. H. & H. R. R. Co., 52 Conn., 274; S. C., 25 Am. & Eng., R. R. Cases, 215.

"Where power is given by statute to one corporation to *consolidate* with *any* other, whatever other corporation it selects for a union and finds willing to join it, has power to unite with it, although such other corporation is not *named* in the statute."

1 Thompson on Corp., p. 214, Sec. 315.
2 Cook on Stock & Stockholders & Corp. Law, p. 1503, Sec. 894.
2 Morawetz on Corp., 898, Sec. 941.
Prospect Park vs. Coney Island R. R., 67 N. Y., 371, 377.

"The authority given to any railroad company to buy necessarily implies authority to other companies to sell, inasmuch as there could be no purchase without a corresponding sale."

City, etc., vs. K. & O. R. R. Co., 22 Fed. Rep., 758. 763.

But it is immaterial whether the purchase was *ultra vires* or not. The Railroad Company has been operating the bridge for nearly fifty years, without let or hindrance, under claim of ownership, and during all that time their ownership of it has not been questioned. They are conclusively presumed to have the title thereto, from this long lapse of time, under the doctrine of prescription.

19 Am. & Eng. Enc. of Law, pp., 7, 29.

Moreover, if the sale to the railroad company was *ultra vires* it is not for these defendants to make the objection. It is an objection that can be made only by the stockholders and creditors of the bridge company.

27 Am. & Eng. Enc. of Law, pp. 396, 402.

In addition to all this, the Act of February 9, 1895, is by its terms directed against the "operators" of the Florence Bridge as well as against its "owners", and appellees, therefore, have a right to complain as "operators", if the act prescribes unreasonable rates, in view of the amount of money spent by appellees upon the bridge and in its operation.

V.

The Act of February 9, 1895, impairs the obligation of the contract embraced in the charter of the Florence Bridge Company, whereby that company and its successors are granted the right to fix rates within a certain limit, that is not to exceed "the present (1832) rates of ferriage at said ferry".

The evidence is without conflict that the rates established by appellees and their predecessors and those in force when the act of 1895 was passed, have never exceeded the old ferry rates.

In Stone vs. Yazoo & M. V. R'y Co., 62 Miss., the Court say:

"Fixing rates in a charter is a specification of what is reasonable—an exclusion of tacit or implied conditions on the subject. It is an essential part of the contract of incorporation, the most important condition of its existence, the inducing cause of its acceptance.

"That it was the legfslative intent to vest in the appellee the unrestricted right to fix rates within the limits prescribed by the charter is clear; that this was a valid contract by the State, obligatory and inviolable by it we regard as settled authoritatively by Federal and State decisions too numerous for citation.

"If anything is or ever can be settled in American constitutional law, the sanctity and inviolability of a contract between a State and individuals in the shape of a charter for a business enterprise, accepted and acted on by the corporators on the faith of its terms and provisions, must be so regarded.

"The appellee has the unquestionable right from time to time, by its board of directors, to fix the rates at which it will transport over its railroad, provided those rates shall not exceed the maximum prescribed by the charter. That is the contract. These terms were expressly made. On the faith of them capital was invested and the enterprise set on foot. It is not allowable now for one of the contracting parties to interfere with the exercise by the other of its plainly granted rights. They are secured beyond the reach of legislation and cannot be impaired. The State cannot, by an act of its legislature, abdicate the right to govern artificial as well as natural persons, but

it may create corporations, and where they are a part of the machinery of government, the franchise cannot be resumed by the legislature or its benefits be essentionally impaired without the consent of the grantee.

"To hold otherwise would be revolutionary and disturb the foundatiops of society as molded by the judicial utterances of half a century of constitutional government in America.

"While the rates at which appellee will transport over its roads, not exceeding what is stipulated for in the charter, is for the determination of the appellee and not subject to the control of the State, within the charter limits, it is indisputable that the State may create a commission or board by any name to see that the creature of the State keeps within its charter limits and violates none of its obligations as a common carrier. * * * * * *

"In view of what is written, it must be held that the railroad commission cannot interfere with the rates fixed by the board of directors of the appellee from time to time for transporting persons and property over its railroad, if those rates are within the limits prescribed by the charter, and that the commission can not adopt any rule or regulation as to rates violative of the clearly expressed or necessarily implied charter rights of the company."

Stone vs. Yazoo & M. V. R. R. Co., 62 Miss., pp. 642, 643–44.

In the case of Chicago, etc., R. R. Co., vs. Iowa, in which was involved the constitutionality of an act establishing maximum rates of freight, the railroad company which filed the bill contended that the act was unconstitutional as violating the contract rights of its charter. The Supreme Court held that it was not unconstitutional on this ground, *because its charter did not fix the limit it was to charge, but* Waite, C. J., (with whom concurred Miller, J.,) speaking for the Court, says: "It was within the power of the company to call upon the legislature to *fix permanently this limit* and *make it a part of the charter;* and, if it was refused, to abstain from building the road and establishing the

contemplated business. *If that had been done, the charter might have presented a contract against future legislative interference.*"

Chicago, etc., R. R. Co., vs. Iowa, 94 U. S., 162.

We refer the Court also in this connection to—

Railroad Commission cases, 116 U. S., 307.

In that case the Court construe an act to be constitutional as not violating the obligation of a contract, because, as the Court say on page 330, "there is no rate specified nor any limit set" in the charter, and further, "this is not in conflict with the judgment of the Supreme Court of Mississippi in Railroad Commission vs. Yazoo & Mississippi Railroad Company, in which it was decided that the power had been surrendered in favor of that company because in that charter a maximum of rates was fixed. * * * * * *

And in the last decision of the Supreme Court on this question above referred to, the court, without any dissenting voice, say: "If the charter had in terms granted to the corporation power to charge and collect a definite sum per mile for the transportation of persons and property, it would not be doubted that that express stipulation formed a part of the obligation of the State which it could not repudiate. * * * * *

It is at least a question which arises as to the extent to which that contract goes, and one in which the corporation has a right to invoke the judgment of the courts; and if the corporation, a citizen of the State, has the right to maintain a suit for the determination of that question, clearly a citizen of another State, who has, under authority of the laws of the State of Texas, become pecuniarily interested in, equitably indeed the beneficial owner of, the property of the corporation, may invoke the judgment of the Federal Courts as to whether the contract rights created by the charter, and of which it is thus the benficial owner, are violated by subsequent acts of the State in limitation of the right to collect tolls. Our conclusion from these considerations is that the objection to the jurisdiction of the Circuit Court is not tenable, and this, whether we rest upon the provisions of the statute or upon the general

jurisdiction of the court existing by virtue of the statutes of Congress, under the sanction of the Constitution of the United States."

Reagan vs. F. L. & T. Co., 154 U. S., p. 393.

VI.

Tha Act of February 9, 1895, is in violation of the Federal Constitution, in that it deprives appellees of their property without due process of law, and the enforcement of the rates prescribed by the act would be a virtual confiscation of appellees' property.

This was the ground upon which the lower court based its final decree (Pr. Rec., p. 180–1).

The statute establishes unreasonable rates without allowing appellees a right to be heard, and deprives appellees of their property without making compensation.

Justice Miller, speaking for this Court in a case before quoted, says: "Neither the legislature nor a commission acting under its authority can establish, arbitrarily and without regard to justice and right, a tariff of rates for such transportation which is so unreasonable as to practically destroy the value of property of persons engaged in the carrying business on the one hand, nor so exorbitant and extravagant as to be in utter disregard of the rights of the public for the use of such transportation on the other."

C. W. & St. P. Ry. Co. vs. Minnesota 134 U. S., 418–459.

In another case this Court said: "We do hold that a general averment in a bill that a tariff as established is unjust and unreasonable, is supported by the admitted facts that the road cost far more than the amount of the stock and bonds outstanding; that such stock and bonds represent money invested in its construction; that there has been no waste or mismanagement in the construction or operation; that supplies and labor have been purchased at the lowest possible price consistent with the successful operation of the road; *that the rates voluntarily fixed by the company have been for ten years steadily decreasing until the*

aggregate decrease has been more than fifty per cent.; that under the rates thus voluntarily established the stock, which represents two-fifths of the value, has never received anything in the way of dividends, and that for the last three years the earnings above operating expenses have been insufficient to pay the interest on the bonded debt; and that the proposed tariff, as enforced, will so diminish the earnings that they will not be able to pay one-half the interest on the bonded debt above the operating expenses; and that such an averment so supported will, in the absence of any satisfactory showing to the contrary, sustain a finding that the proposed tariff is unjust and unreasonable, and a decree reversing it being put in force."

Reagan vs. F. L. & T. Co., 154 U. S., 398.

In a third case the Court, speaking of the power of the legislature to regulate rates, adds: "From what has thus been said, it is not to be inferred that this power of limitation or regulation is itself without limit. This power to regulate is not a power to destroy, and limitation is not the equivalent of confiscation. Under pretence of regulating fares and freights, the State cannot require a railroad corporation to carry persons or property without reward; neither can it do that which in law amounts to a taking of private property for public use without just compensation, or without due process of law."

Stone vs. F. L. & T. Co., 116 U. S., pp. 330–31.

That the rates of toll prescribed by the act of 1895 are unreasonable and in their nature and effect confiscatory, is settled conclusively by the recent similar cases of—

C. & L. Turnpike Road Co. vs. Sanford, 164 U. S., 578.
Smyth vs. Ames, 169 U. S., 466.

In the former it is held that a statute reducing the tolls that may be charged by a turnpike company and requiring it to conform to a tariff of rates that is unjust and unreasonable, which prevents it, out of its receipts, from keeping its road in proper condition for public use or from earning any dividends whatever for stockholders, is unconstitutional as a deprivation of

property without due process of law. This decision was based upon facts no stronger than those in the case at bar, as shown by the following portion of the opinion:

"A statute which by its necessary operation compels a turnpike company, when charging only such tolls as are just to the public, to submit to such further reduction of rates as will prevent it from keeping its road in proper repair and from earning any dividends whatever for stockholders, is as obnoxious to the Constitution of the United States as would be a similar statute relating to the business of a railroad corporation having authority, under its charter, to collect and receive tolls for passengers and freight.

"The answer disclosed what had been the average annual receipts of the company under the act of 1865 for a number of years immediately preceding the passage of the act of 1890, and what during that period had been the average annual expenses; alleged that the receipts for the several preceding years had not admitted of dividends greater than 4 per cent. on the par value of the company's stock; that the act of 1890 reduced the tolls 50 per cent. below those allowed by the act of 1865; and that such reduction would so diminish the income of the company that it could not maintain its road, meet its ordinary expenses, and earn any dividend whatever for stockholders. These allegations were sufficiently full as to the facts necessary to be pleaded, and fairly raised for judicial determination the question,—assuming the facts stated to be true,—whether the act of 1890 was in derogation of the company's constitutional rights. It made a *prima facie* case of the invalidity of that statute."

The other case cited above—and last decision on the subject—the Nebraska Rate case—decides that:—"A State enactment or regulations made under the authority of a State enactment, establishing rates for the transportation of persons or property by railroad that will not admit of the carrier earning such compensation as under all the circumstances is just to it and to the public, would deprive such carrier of its property without due process of law, and deny to it the equal protection of the laws, and would therefore be repugnant to the 14th amendment of the Constitution of the United States."

In arriving at a determination as to whether or not certain rates are reasonable this Court has laid down the following rules as to the matters to be considered:—"The first and most important contention of the plaintiff is that, if the statute had been in force during any one of the three years preceding its passage, the defendant companies would have been compelled to use their property for the public substantially without reward or without the just compensation to which it was entitled. We think this mode of calcuation for ascertaining the probable effect of the Nebraska statute upon the railroad companies in question is one that may be properly used.

"The basis of all calculations as to the reasonableness of rates to be charged by a corporation maintaining a highway under legislative sanction must be the fair value of the property being used by it for the convenience of the public, and, in order to ascertain that value, the original cost of construction, the amount expended in permanent improvements, the amount and market value of its bonds and stock, the present as compared with the original cost of construction, the probable earning capacity of the property under particular rates prescribed by statute, and the sum required to meet operating expenses, are all matters for consideration, and are to be given such weight as may be just and right in each case. We do not say that there may not be other matters to be regarded in estimatiug the value of the property. What the company is entitled to ask is a fair return upon the value of that which it employs for the public convenience."

Smith vs. Ames, 169 U. S., 466.

Let us apply the rules thus laid down to the facts in the case at bar.

R. B. Pegram and A. H. Plant both show that if the bridge was operated under the schedule of rates prescribed by the act it would amount to furnishing a free bridge to the public, and that indeed the bridge would be operated at an actual loss to appellees. (Pr. Rec., pp. 86, 149).

Under the rates adopted by appellees themselves—and they are double those prescribed by the act—the bridge has been operated at a loss ever since the receivers were appointed in

June, 1892 (Pr. Rec., p. 149, 156). During that time the receipts from the bridge have been gradually decreasing (Pr. Rec., pp. 87, 91).

The value of the entire bridge is estimated at about $259,000, and of this $176,000 is estimated as the value of the foot-way portion or toll portion, taking into consideration its original cost, the value of permanent improvements, the character of the structure, and the present as compared with the original cost of construction (Pr. Rec., pp. 162, 163, 150, 85, 86, 87 and 166). It is shown by the statement on page 160, Printed Record, that the gross earnings, expenses and net earnings on the toll portion of the bridge at the rates in force when the act of 1895 was passed and as compared with the rates prescribed by that act are as follows:

AT PRESENT RATE.

For the year	1893–4.	1894–5.	1895–6.
Gross earnings	$3,113.71	$3,458.52	$4,414,54
Expenses	2,299.16	2,219.90	2,268.23
Net earnings	$ 814.55	$1,238.62	$2,146.31

AT RATES PRESCRIBED BY THE ACT.

For the year	1893–4.	1894–5.	1895–6.
Gross earnings	$1,556.86	$1,729.26	$2,207.27
Expenses	2,299.16	2,219:90	2,268.23
Net earnings	$ 742.30	$ 490.64	$ 60.96

It thus appears that the earnings at the present rates, estimated upon the basis of $51,083.34 the assumed arbitrary value placed upon the foot-way portion of the bridge under the contract between the L. & N. Railroad and the M. & C. Railroad, were only 1.6 per cent., 2.4 per cent. and 4.2 per cent. for said three years respectively, or an average of only 2.7 per cent. per year.

If incidental expenses, such as lawsuits, insurance, etc., were included the rate per cent. earned at present rates would be even less (Pr. Rec., p. 86).

The same net earnings at the present rates, estimated upon the actual cost and value of the toll portion of the bridge ($176,242.33), would equal an annual per centage upon the amount invested of only (about) one-half of 1 per cent., two thirds of 1 per cent. and 1¼ per cent. for said three years respectively, or an average of only twenty-nine thirty-sixths of 1 per cent. per year, with which to pay insurance, interest on bonded debt, and incidentals.

When we remember that the bonded debt (Pr. Rec., p. 151) is $5,524,000.00 or about $20,000 per mile, it becomes still more clear why the bridge has been run at a loss since 1892, at the rates of toll adopted by appellees themselves. The actual loss under the rates prescribed by the act will be even still greater as shown by the foregoing statement.

The rates of toll the appellees were charging on the bridge are no higher than those charged on similar bridges, even where the amount of travel is much greater than on this bridge. It is permissible and proper to make this comparison, for as this Court has said, quoting from the Court of Appeals of Kentucky: "A turnpike road leading into and connected with a populous city could afford to charge less toll by reason of the immense travel upon it than turnpikes in thinly settled portions of the county or State."

> *Covington & L. Turnpike Co., vs. Sandford, 164, U. S., p. 578–598.*

The witness R. B. Pegram testifies (Pr. Rec., p. 86) "The toll fixed by the act for foot passengers is five cents. This is the same as the rate on the St. Louis bridge crossing the Mississippi River at St. Louis, Mo. The average number passing over this last named bridge daily is about 15,000, and the average number over this bridge at Florence about 17, and the proportion of travel as to vehicles, etc., is about the same. The tolls of the Florence bridge are not largely in excess of those charged by the St. Louis bridge. The rate, for instance, over the St. Louis bridge for a two-horse wagon-load, according to my recollection, is 50c; over the Florence bridge it is 60c."

According to the evidence in this case, the population of Florence, on one side of the river, is only between 6,000 and 7,000, and that of Sheffield, on the other side, but three miles from Florence and two miles from the bridge, is only about 2,500.

According to the census of 1890 the population of St. Louis was 452,000, and that of East St. Louis, Ill., at the other end of the St. Louis bridge, was 15,000.

When we recall that the evidence of Pegram and Plant, and the statements attached to the latter's evidence, are practically uncontradicted, we respectfully submit that no conclusion can be reached from the record in this case other than that the rates prescribed by the act of 1895, if enforced, would deprive appellees of their property and property rights without due process of law.

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